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JOSEPH F. SPANIOL, JR.
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No. 87-410

In The
Supreme Court of the United States
October Term, 1987

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MEXICANA AIRLINES,

Petitioner,

v.

JOSEPH D. WOLGEL and EDYTHE R. WOLGEL,

Respondents.

—o—

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

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QUESTIONS PRESENTED FOR REVIEW

Is the Warsaw Convention inapplicable to cases of nonperformance of a contract and claims for discriminatory "bumping" under § 404(b) of the Federal Aviation Act as the Seventh Circuit held?

Is there any valid reason for applying the two-year limitation period of the Warsaw Convention to actions arising under § 404(b) of the Federal Aviation Act for domestic flights which were never performed?

Is there any valid reason for making a distinction between actions for nonperformance of contracts for domestic flights arising under § 404(b) of the Federal Aviation Act and actions under that statute involving nonperformance of contracts for international flights, for the purpose of applying different limitation periods for unperformed domestic flights and unperformed international flights?

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Respondents, Joseph D. Wolgel and Edythe R. Wolgel, pray that the petition for writ of certiorari be denied.

Rule 28.1 of the Supreme Court Rules concerning corporations is inapplicable to respondents.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1. The Warsaw Convention does not apply to cases of non-performance of a contract or claims for discriminatory bumping under § 404(b) of the Federal Aviation Act.

Petitioner's statement of the case is inaccurate. As indicated by the Court of Appeals, respondents' action was for discriminatory "bumping" and there was no factual dispute raised in the District Court. App. 1a, 2a. It is also not true that "(a)ny claim arising out of the passenger tickets . . . is subject to the uniform liability rules of the (Warsaw) Convention" as claimed on page 4 of the petition. App. 6a. [Parenthetical matter added.]

The respondents actually have two claims. One is for nonperformance of a contract entered into in Illinois. The other is for discriminatory "bumping" under § 404 (b) of the Federal Aviation Act ("FAA"), 49 U.S.C. app. § 1374(b) (1982) (repealed 1983). In both the District Court and the Court of Appeals, the petitioner's sole argument was that the respondents' exclusive remedy was under the Warsaw Convention and that their claims were barred by the two-year limitation period.

Although the petitioner now concedes that the Warsaw Convention does not apply to respondents' claims since no transportation occurred, it now urges for the first time that the two-year limitation period of the Warsaw Convention be engrafted onto § 404(b) of the FAA even though no international transportation ever took place in this case.

2. Since § 404(b) of the FAA applies to both domestic and foreign air carriers who fail to furnish transportation, there is no legitimate reason for engrafting the two-year limitation period of an international treaty involving actual transportation, contrary to settled practice.

The petitioner has overlooked the express language of § 404(b) of the FAA which prohibits discrimination by both domestic and foreign air carriers. The petitioner offers no rational argument as to why claims against domestic air carriers who fail to furnish domestic transportation should be subject to a two-year limitation period. Nor, for that matter, does it offer any rational argument as to why an international treaty governing actual transportation should be applied in any manner to a statute made expressly applicable to the failure to furnish transportation.

If the petitioner is urging that the two-year limitation period be engrafted only for international flights that do not take place under § 404(b) of the FAA, then it is, in effect, arguing for an even greater multiplicity of limitation periods.

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CONCLUSION

There is no legitimate basis for the petitioner's new argument that unperformed international flight contracts which are not governed by the Warsaw Convention should nevertheless be considered as if they were performed so as to be subject to the two-year limitation period and that

such unperformed contracts be treated differently than unperformed domestic flight contracts contrary to the language of § 404(b) of the FAA which make no distinction between unperformed domestic and international flight contracts.

Respectfully submitted,

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